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**In the Supreme Court**ALEXANDER L. STEVAS,  
CLERK

OF THE

**United States**

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**OCTOBER TERM, 1982****CONTRA COSTA THEATRE, INC., a corporation,  
Petitioner,****vs.**

**CITY OF CONCORD, a municipal corporation,  
REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,  
WILLIAM H. DIXON, RICHARD L. HOLMES, JUNE V. BULMAN,  
LAURENCE B. AZEVEDO, RICHARD T. LA POINTE,  
FARREL A. STEWART, RICHARD C. STOCKWELL,  
PETER H. HIRANO, JAMES MURPHEY, EDWARD H. PHILLIPS,  
GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK,  
ROBERT T. BARKOFF, LYNNET A. KEIHL, DAVID STEELE,  
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,  
MILTON D. REDFORD, DAVID A. BROWN,  
DELTA BINGHAM JOINT VENTURE, a partnership,  
REYNOLDS & BROWN, a partnership, and  
Does I through 100,  
Respondents.**

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF IN OPPOSITION**

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No. 82-1435

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*Respondents.*

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### BRIEF IN OPPOSITION

#### I

#### STATEMENT OF THE CASE

The petitioner seeks review of the dismissal of this case by the United States District Court for the Northern District of California. On appeal, the Court of Appeals for the Ninth Circuit upheld the District Court's dismissal

in a one sentence opinion expressing the Court of Appeals' agreement with the District Court opinion.

This action is a not very subtle attempt to circumvent rulings in a state court condemnation proceedings regarding California land use law. Petitioner operated a single-screen drive-in theatre in the City of Concord, California. When opened in 1960, the drive-in conformed to existing City land use plans and policies. However, those plans had changed over the years. In 1977, when Petitioner applied to the City for a land use permit to expand the theater by adding several additional screens, the Planning Commission denied the permit because the expanded use was not in conformance with the City's General Plan, with the City's specific plan for the area, or with the Redevelopment Agency's Central Concord Redevelopment Plan.<sup>1</sup> Although having a right to do so petitioner did not seek any administrative or judicial relief to invalidate the permit denial.

Several months following denial of the use permit, the Redevelopment Agency brought a state court eminent domain action to acquire petitioner's leasehold interest in the property on which it operated the drive-in. In that action petitioner sought compensation of \$2.25 million based on the value of a multiple-screen drive-in. Petitioner alleged that there was a conspiracy to deny the use permit so as to hold down the value of the property in the later condemnation. Petitioner argued that because

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<sup>1</sup>The denial of the permit had no effect on the operation of the existing single-screen drive-in. That use was a pre-existing non-conforming use which was permitted to continue despite subsequent changes in plans which would have otherwise prohibited the use. Petitioner, therefore, has not claimed nor could it claim that the denial of the use permit constituted a taking of its property.

the conspiracy constituted unreasonable precondemnation activity under the California Supreme Court ruling in *Klopping v. City of Whittier*, 8 Cal.3d 39 (1972), it was entitled to value its property in the condemnation as if the use permit had been approved. The state trial court, after hearing petitioner's evidence of the alleged unreasonable precondemnation activity, held that petitioner was not entitled to compensation based on that alleged activity. Petitioner was awarded compensation of \$750,000 for the single-screen drive-in.

After the state court judgment was entered, petitioner appealed the judgment to the California Court of Appeal and then brought this action seeking the \$1.5 million difference between the \$750,000 awarded in the state court action and the \$2.25 million it had sought in that action.

Although styled as a civil rights action under 42 U.S.C. Section 1983, this action alleges the same facts as were alleged in the state court condemnation action as grounds for compensation for alleged unreasonable precondemnation activity. In each case petitioner alleged a grand conspiracy to deny the use permit so as to hold down the value of the drive-in in the later condemnation action. See Petition for Writ of Certiorari, Appendix B at 6-10; Petition for Writ of Certiorari at 3-5; *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal.App.3d 73 (1982).

Subsequent to the Ninth Circuit Court of Appeals decision in this case, the California Court of Appeal decided petitioner's appeal of the state court condemnation judgment. *Redevelopment Agency v. Contra Costa Theatre*,

*Inc.*, 135 Cal.App.3d 73 (1982). In holding that the evidence before the trial court could not support damages for the Planning Commission's failure to approve the use permit, the California Court of Appeals noted:

Here, the evidence submitted to the trial court showed no more than a denial of appellant's application for a use permit because of a proposed use of the subject property inconsistent with the recently drafted city plans for the area. No conspiracy among city officials was established; no intent to diminish the value of appellant's leasehold interest is revealed by the evidence.

135 Cal.App.3d at 81-82.

Petitioner sought California Supreme Court review of the California Court of Appeal decision, but review was denied on November 24, 1982. Minutes of the California Supreme Court for November 24, 1982, Volume 34, 1982 California Official Reports Advance Sheets (December 21, 1982).

## II

### ARGUMENT

#### **A. The Lower Courts Correctly Held That Petitioner Had No Protected Property Right**

The District Court's ruling, upheld by the Court of Appeals, that petitioner had no protected property right with respect to the use permit decision is in full accord with the law on this point. To determine whether a litigant has a protected property right under *Board of Regents v. Roth*, 408, U.S. 564 (1972), the courts have focused upon the extent of the discretion allowed to the government



decision-maker. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980); *United Land Corporation v. Clarke*, 613 F.2d 497 (4th Cir. 1980); *Griffeth v. Dietrich*, 603 F.2d 118 (9th Cir. 1979). Where the government decision-making body has broad discretion to decide an issue either in favor of or against the applicant, the applicant has no legitimate expectation or claim of entitlement to a favorable decision. The applicant, therefore, has no protected property right. *Board of Regents v. Roth*, supra at 557.

For example, in *Board of Regents v. Roth*, supra, this Court held that a college teacher had no protected property right in his job where his employer had broad discretion not to rehire him. Similarly, in *United Land Corp. of America v. Clarke*, supra, the court held that a permit applicant had no protected property right with respect to a land use permit where the responsible official was given broad discretion to rule on permits in order to "accomplish the objectives of the ordinance" which objectives included "promoting public health and welfare." See also *Russell v. Landrieu*, supra, (Tenants in federally owned housing did not have protected property right with respect to sale of housing where Secretary of Housing and Urban development has broad discretion to dispose of housing in a manner which is consistent with the objectives and priorities of the National Housing Act.); *Jacobson v. Hanifin*, 627 F.2d 177 (9th Cir. 1980). (No protected property right in obtaining gambling permit where Gambling Commission has substantial discretion to grant or deny permit); *Shamie v. City of Pontiac*, 620 F.2d 118 (6th Cir. 1980) (No protected property interest in obtaining liquor license where city regulations give broad discretion to issue or reject permit.)



In this case, the decisional rules of the City of Concord with respect to grant or denial of use permits involve extremely broad discretion. The City of Concord Municipal Code sets forth a broad standard which authorizes denial of a use permit if the proposed use will be detrimental to the health, safety or welfare of the City or the surrounding neighborhood. See Petition for Writ of Certiorari, Appendix B at 11-12. Like the teacher in *Board of Regents v. Roth*, supra, whose employer could refuse to rehire him for virtually any reason, petitioner was in a position where its use permit application could be denied for virtually any reason. No matter how carefully petitioner may have planned its proposed drive-in expansion, the City could still reject the permit because of the detrimental impact on the surrounding area of the light, noise and traffic generated.<sup>2</sup>

Petitioner's lack of any legitimate expectation of or entitlement to a use permit is further evidenced in this particular case by the fact that the proposed use was not in conformance with the City's General Plan which governed use and development of petitioner's property. Petition for Writ of Certiorari, Appendix B at 8. California law imposes the very rational requirement that a city's zoning actions conform to its general plan. Calif. Government Code Section 65860. Thus, at the time the Planning Commission made its use permit decision, petitioner

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<sup>2</sup>See *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *HFH Ltd. v. Superior Court*, 15 Cal.3d 508 (1975) which establish a general rule that a landowner normally has no vested right to application of a particular land use classification to his or her property.

could hardly be said to have had a legitimate expectation that the Planning Commission would approve a permit for a use which would violate the City's General Plan.

In the situation posed in this case where the decisional rules create broad discretion based on a general health, safety and welfare standard and where the proposed use does not conform to the relevant land use plans, there can be no legitimate expectation of issuance of a use permit. Therefore, the District Court in dismissing the action, and the Court of Appeal in upholding the dismissal, acted correctly.

#### **B. The California Court of Appeal Decision Disposes of this Action**

In the Court of Appeal and the District Court, respondents argued that the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny provided grounds for dismissal. That argument was made because the filing of this action threatened to interfere with the then pending state court eminent domain action in which petitioner had the opportunity to, and in fact did, raise the same issues it raises here. The final disposition of the state condemnation action has taken this case a step beyond the principles of comity and federalism expressed in *Younger* and implicated principles of res judicata.

In the state court action, petitioner attempted to prove that there was a conspiracy to deny the use permit for the purpose of holding down the value of the property. The trier of fact concluded that no such conspiracy or purpose existed. Petitioner cannot now have the prover-

bial second bite of the apple in this action. Application of rules of *res judicata* prevent petitioner from now going into federal court and seeking to prove for a second time the existence of the alleged conspiracy which formed the basis for its claim of unreasonable precondemnation activity in the condemnation case and its claim in this case. *Federated Department Stores, Inc. v. Motie*, 452 U.S. 394 (1981); *Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. U.S.*, 440 U.S. 147 (1979); *Angel v. Bullington*, 330 U.S. 583 (1946); *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

Thus, even if this case were remanded to the District Court, the intervening final decision of the California courts would now dictate dismissal of the case.

### III CONCLUSION

This case was decided correctly by the lower federal courts and does not present a conflict among the various courts of appeal or a pressing issue which requires decision of this Court. This litigation had its origin in a state court condemnation action in which petitioner had a full and fair opportunity to prove its alleged conspiracy and recover the damages allegedly flowing from that conspiracy.

Petitioner's lack of protected property right to issuance of the use permit and the final decision in the state court condemnation action provide ample grounds for keeping the federal courts out of this dispute. The District Court's dismissal of this action, upheld by the Court of Appeals, properly allowed the litigation to run its course in state

court without interference. That dismissal, therefore, should be upheld and the petition for writ of certiorari denied.

Dated: March 25, 1983.

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